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No. 00-607
[Capital Case]

In The
Supreme Court of the United States

RONALD A. GRAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ["NACDL"] is a non-profit corporation with a subscribed membership of more than 10,000 national members, including military defense counsel, and an additional 28,000 state, local and international affiliate members.[1] The American Bar Association recognizes the NACDL as one of its affiliate organizations and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases, both civilian and military. Among the NACDL's objectives are ensuring justice and due process for persons accused of crime, promoting the proper and fair administration of criminal justice and preserving, protecting and defending the adversary system and the U.S. Constitution.

The NACDL's interest in this case is two-fold.[2] First, it is a *peace time* death penalty case involving fundamental Constitutional questions and issues under the Bill of Rights and their application to America's servicemen and women. Second, the proper and fair administration of military justice under the Uniform Code of Military Justice ["UCMJ"] which impacts upon these fundamental Constitutional rights, requires that this Court be the final arbiter of what process is due to our uniformed service members, particularly in a capital case and to insure "Equal Justice Under Law."

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[1]No counsel for a party authored this Brief in whole or in part. No person, entity or organization other than the *amicus curiae* made a monetary contribution to the preparation and submission of this brief or to counsel for the NACDL.

[2]Counsel for the Parties have consented to the NACDL filing this Brief and these consents are on file with the Clerk.

STATEMENT OF FACTS

The NACDL accepts Petitioner's "Statement of Facts." We note additional relevant and undisputed factual matters in the record which support the granting of *certiorari* and relief for Petitioner. The Convening Authority[3] originally detailed a panel of fifteen prospective court members [R. 1a-2]. This was done based upon the specific, legal advice of the Convening Authority's official lawyer, his Staff Judge Advocate ["SJA"] [R. Appellate Exhibit LIX] [4] After *voir dire* and the challenge process,[5] only six members remained on the panel. The Defense then moved "as a matter of equal protection and due process, to require that there be a panel of twelve persons and to delay this proceeding (*sic*) the appointment - or the detailing of enough members to get up to twelve." [R. 768-69].

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[3]In military jurisprudence, the Commander who "convenes" the court-martial, is referred to as the "Convening Authority." In a General Court-Martial, such as Petitioner's, the Convening Authority also decides as applicable whether or not to "refer" the case as capital or non-capital, and selects the panel of prospective members under the UCMJ. *See* Articles 16, 18, 22 and 34 UCMJ, 10 U.S.C. §§ 816, 818, 822 and 834.

[4]Article 34, UCMJ, 10 U.S.C. § 834, mandates a "Pre-Trial Advice," which this exhibit supplemented. Thus, *both* the Convening Authority and his counsel, believed that detailing a panel of fifteen members was appropriate in this capital case. Article 16(1)(A), UCMJ, 10 U.S.C. § 816(1)(A), while setting a ***minimum*** number of members to constitute a generic quorum for general courts-martial at five members, sets no ***maximum*** number of members leaving that to the discretion of the Convening Authority. Rule 501(a)(1)(A), Rules for Courts Martial ["RCM"], contained in the *Manual for Courts-Martial* ["MCM"], an Executive Order promulgated pursuant to Article 36, UCMJ, 10 U.S.C. § 836, requires that a general court-martial contain "***not less than*** five members." [Emphasis added].

[5]Article 41, UCMJ, 10 U.S.C. § 841.

The Military Judge[6] in response noted:

> That may be a point that, in the future, is well-founded if the Congress thought - perhaps the Supreme Court itself, in their infinite wisdom, decided that's the way it should be, and I applaud you for recording for posterity . . . . The law, as it exists under the military system, which is a system unto itself which the Congress has elected to enact and which the Congress - no, it was the Supreme Court - thus far at least have blessed, is to the effect that the minimum requirement is five officers - is five members. We have six and we meet the criteria. [R. 769]

The prosecution[7] opposed the motion, stating, "We agree with the court in this case." [R. 769]. The following exchange then took place:

> MJ: Well, I interrupted my thought merely because ***if the government were to be of the mind that they wanted to have twelve members, I certainly wouldn't contest it.*** [emphasis added]
>
> TC: We are not, Your Honor.
>
> MJ: All right. Based upon the rationalization advanced previously, the motion for requirement of at least twelve members is denied. [R. 770].

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[6]Customarily and historically, the trial judge in a court-martial is referred to as the "Military Judge," abbreviated in the record as "MJ."

[7]In military parlance a prosecutor is the "Trial Counsel," or "TC."

SUMMARY OF ARGUMENTS

The Petitioner was sentenced to death by a six person, military jury. The NACDL submits that a member of the United States military who is prosecuted in peacetime for a capital offense, is entitled to the same measure of constitutional due process as any other citizen prosecuted by the United States, *viz.* a twelve person panel. Since neither the Uniform Code of Military Justice,[8] nor the *Manual for Courts-Martial*,[9] specifically addresses the size or number of members necessary in a peacetime, capital case,[10] one must look to both the historical practice and constitutional jurisprudence to ascertain what process is due. Congress delegated this authority to the President[11] who, while promulgating Rule 1004, RCM, discussing capital cases, did not address the number of members issue. The U.S. Court of Appeals for the Armed Forces in *United States v. Matthews,* 16 M.J. 354 (C.M.A. 1983),[12] concluded that at least for peacetime military capital cases, that military sentencing procedures must comport with civilian constitutional standards.

Here the Convening Authority upon the advice of his lawyer, detailed fifteen members to Gray's court-martial. But, when the panel's size was reduced to six members after challenges, the defense moved to "delay this proceeding" to allow additional members detailed so as to have a jury of twelve. It was arbitrary, capricious and constitutionally erroneous for

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[8]10 U.S.C. § 801, *et seq.*

[9]Promulgated by the President as Commander-in-Chief.

[10]*See* footnote 5, *supra.*

[11]Article 36(a), UCMJ, 10 U.S.C. § 836(a).

[12]That Court was previously called "The Court of Military Appeals."

the military judge to have deferred to the Prosecutor, the very person seeking death, on this fundamental issue. Since Congress gave the Convening Authority the exclusive authority to select and detail court members,[13] the military judge's error was compounded by his refusal to seek the Convening Authority's input.

ARGUMENT IN SUPPORT OF PETITIONER FOR GRANTING *CERTIORARI*

I. A CITIZEN-SOLDIER TRIED BY GENERAL COURT-MARTIAL IN PEACETIME IN THE UNITED STATES, IS ENTITLED TO THE SAME MEASURE OF CONSTITUTIONAL DUE PROCESS AS ANY OTHER CITIZEN, BEFORE BEING SUBJECTED TO A DEATH SENTENCE.

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.[14]

Ronald Gray, the Petitioner, was a Soldier in the United States Army at the time that he was sentenced to death by a six person general court-martial panel at Ft. Bragg, North Carolina

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[13] *See* Article 25(d)(2), UCMJ, 10 U.S.C. § 825(d)(2), which provides in relevant part:

> "When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."

[14] *Ex Parte Milligan*, 71 U.S. 2, at 120-21 (1866). *Milligan* involved an application of "martial" law, as opposed to pure "military" law, a distinction discussed in its concurring opinion at 141-42.

on April 12, 1988. In peacetime at least, it has long been recognized that with the exception of the Grand Jury Clause, the Fifth Amendment's due process guarantees apply to members of our Armed Forces being court-martialed. One early military commentator, Captain William DeHart, in his treatise first published in 1846, titled, *Observations on Military Law and the Constitution and Practices of Courts Martial* (1859 ed. Wiley & Hall, NYC; reprinted at 18 *Classics in Legal History*, 1973, Wm. S. Hein & Co., Buffalo, NY) [hereinafter, "DeHart"], notes that with the exception of the Grand Jury clause:

> [M]ilitary courts take cognizance of such matters as justly fall within their competency, and proceed against offenders, according to the language of the constitution, by "due process of law," which terms applied, in reference to this subject, are convertible with those of, *by the law of the land.* (emphasis in original; citing Kent's *Commentaries*, vol ii, page 10).

See also, G. Henderson, *Courts-Martial and the Constitution: The Original Understanding,* 71 Harv. L. Rev. 293 (1957) [Bill of Rights applies to military unless expressly excluded].

This Court in the context of a 14th Amendment, due process analysis traced the ancient history of the "law of the land" and its evolution into "due process of law." *Hurtado v. California,* 110 U.S. 516, at 522 *et seq.* (1884). *Hurtado* recognized that in evaluating due process issues, "that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country. . . ." 110 U.S. at 528. Furthermore, there can be no question that service members "are entitled to the due process of law guaranteed by the Fifth Amendment." *Middendorf v. Henry,* 425 U.S. 25, at 43 (1976).

As the Court observed in *Weiss v. United States*, 510 U.S. 163, at 174 (1994), "By enacting the Uniform Code of Military Justice in 1950, and through subsequent statutory changes, Congress has gradually changed the system of military justice so that it has come to more closely resemble the civilian system."[15] *Amicus* does *not* suggest that the Fifth Amendment due process guarantees for military members must be applied in the same context as in civilian criminal prosecutions. Rather, we respectfully submit that in a peacetime capital trial by a general court-martial, to avoid offending the Eighth Amendment's proscription against the *arbitrary* imposition of the death penalty, that the process due, *i.e.*, a twelve person jury,[16] commands that a capital court-martial consist of twelve members. This analytical framework was provided in *Rostker v. Goldberg*, 453 U.S. 57, at 67 (1981), where this Court held:

> None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause. . . but the tests and limitations to be applied may differ because of the military context. [internal citations omitted].

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[15]*Cf.* Article 36(a), UCMJ, 10 U.S.C. § 836(a), which in delegating "Pretrial, trial, and post-trial procedures" in courts-martial to the President specifically suggests that the President "apply the principles of law . . . generally recognized in the trial of criminal cases in the United States district courts. . . ."

[16]We recognize that this Court has yet to interpret the Constitution as mandating a 12 person jury in a *capital* case. *Williams v. Florida*, 399 U.S. 78 (1970), was a *non-capital* case where the Florida statute at issue expressly stated , "Twelve men shall constitute a jury to try all capital cases. . . ." 399 U.S. at 80, fn. 3. *Compare, Thompson v. Utah*, 170 U.S. 343 (1898) [non-capital case decided on *ex post facto* grounds]. Of relevance to this issue is the fact that Article 45(b), UCMJ, 10 U.S.C. § 845(b), bars an Accused from entering a guilty plea in a capital case, while Article 18, UCMJ, 10 U.S.C. § 818, precludes on jurisdictional grounds an Accused from waiving members in a *capital* case. Thus, *Hurtado's, supra*, "settled usage" analysis of due process becomes critical in resolving this case.

See also, Weiss, supra, at 176.

This case has two fundamental constitutional elements. First, the plenary power of Congress under Article I, § 8, cl. 14, U.S. Const., "To make Rules for the Government and Regulation of the land and naval forces." The second is the President's status as Commander-in-Chief, Article II, § 2, cl. 1, U.S. Const., to include those military powers delegated by Congress. *See, e.g., Loving v. United States,* 517 U.S. 749, at 769 (1996). But, while Congress could have expressly legislated a *separate* number of members for a general court-martial in a capital case,[17] or while the President in promulgating the *Rules for Courts-Martial* could also have set such a number, they have *not* done so. Thus, there is no constitutional tension here between an act of Congress or a Presidential order and the Due Process clause. As such, the "balancing" test employed in *Middendorf, supra* at 44, and in *Weiss, supra* at 177-78, is inapplicable herein.

Justice Ginsburg, concurring in *Weiss,* notes that "men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service." 510 U.S. at 194.[18] That observation aptly reflects the holding in *United States v. Matthews,* 16 M.J. 354 (C.M.A. 1983). *Matthews* reversed a peacetime death sentence, finding that the military's procedures were constitutionally

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[17]As noted below, historically under various versions of the *Articles of War,* (including some that predated the Constitution), the number of members in a general court-martial was ***not less than*** 13.

[18]*See also, Loving, supra* at 774, where Justice Stevens notes, "when the punishment may be death, there are particular reasons to ensure that the men and women of the Armed Forces do not by reason of serving their country receive less protection than the Constitution provides for civilians." (Stevens, J., concurring). Justices Souter, Ginsburg and Breyer joined this opinion.

flawed under *Furman v. Georgia*, 408 U.S. 238 (1972). The *Matthews'* Court stated:

> [W]e see no reason why Matthews should be executed . . . if the sentencing procedures used by the court-martial failed to meet the standards established by the Supreme Court for sentencing in capital cases in civilian courts. *There is no military necessity for such a distinction*; and we do not believe that applying lower standards in this case would conform to the intent of Article 55[19] or of the Eighth Amendment. 16 M.J. at 369. [emphasis added].

The military's highest court revisited capital jurisprudence when it first considered *United States v. Curtis*, 32 M.J. 252 (C.M.A. 1991).[20] *Curtis* decided in *dicta* that military capital jurisprudence did not require a twelve person panel. 32 M.J. at 267.[21] The Court's opinion fails to state why (other than the obvious preservation issue) it rejected the twelve member argument, other than a generic holding that "RCM 1004. . . complies with due process requirements. . . ." 32 M.J. at 269.

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[19]Article 55, UCMJ, 10 U.S.C. § 855. This prohibits courts-martial from imposing "cruel and unusual punishment." Early in its existence, the then Court of Military Appeals held that in enacting Article 55, "Congress intended to confer as much protection as that afforded by the Eighth Amendment. Additionally . . . we believe that it intended to grant protection covering even wider limits." *United States v. Wappler*, 2 U.S.C.M.A. 393, 9 C.M.R. 23, at 26 (C.M.A. 1953), *see also*, Judge Fletcher's concurring opinion in *Matthews*, 16 M.J. at 383.

[20]*Curtis* has a lengthy appellate history. *See* 33 M.J. 101 (C.M.A. 1991) [*fur. rev.*; case remanded]; 44 M.J. 106 (1996) [*aff'd*]; 46 M.J. 129 (1997) [*recon. granted*; death sentence vacated and remanded]; and 52 M.J. 166 (1999) [life sentence affirmed].

[21]Then Chief Judge Sullivan's opinion notes that Curtis failed to object at trial to his 9 member panel, nor did he, as Gray has done here, request the detailing of additional members. 32 M.J. at 271 [Sullivan, C.J., concurring].

Finally, the record herein clearly shows that at trial, the Prosecution never advanced any "military necessity" argument or claimed any "manifest injury" would result if Gray's Motion for a twelve member panel were granted. [R. 768] Indeed, they could not, as the Convening Authority had detailed *fifteen* members to Gray's court-martial. As the record also shows, the final number of members, six, in Gray's case was simply the result of an *arbitrary* decision by the Prosecutor - not the Military Judge, and certainly not the Convening Authority.

A. The Fifth Amendment's Requirement That "Nor Shall Any Person. . . Be Deprived of Life . . . Without Due Process of Law. . . ," must Apply in Peacetime under the U.C.M.J. for a Capital Offense, and must Be Construed in Conjunction with the Article III, § 2, Cl. 3, U.S. Constitution, Requirement That "The Trial of All Crimes, [Except Impeachment] Shall Be by Jury. . . ."

While it may be a "historical accident"[22] that for *non-capital* cases, twelve person juries were the standard and therefore not a mandate of the Sixth Amendment, any analysis of *federal* (to include courts-martial) criminal procedure cannot ignore the plain language of Article III, § 2, cl. 3, of the Constitution, *i.e.*, that "The Trial of all Crimes . . . ***shall be*** by Jury. . . ." [emphasis added]. This mandatory language was "plainly understood during the ratification period as words of obligation."[23] Thus, pre-Constitutional history is relevant in

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[22]*Williams v. Florida*, 399 U.S. 78, at 102 (1970).

[23]A. Amar, *The Bill of Rights*, at 105 (1998) [hereinafter "Amar"], citing *The Federalist, No. 83*. There Hamilton states that with respect to criminal cases, this is an (continued..)

ascertaining what the Founding Fathers were referring to, especially in capital cases, as a "jury."

> [I]mbedded in the English consciousness of liberty under law was the idea of trial by jury. Mentioned as early as 1166 in connection with crimes (Assize of Clarendon), by 1342 the twelve-man English jury was a regular fixture.[24]

Professor Rutland goes on to note that by 1628, Charles I "had reluctantly agreed to the proposition that no freeman might lose his life . . . without due process of law. . . ." Rutland, at 6. Clearly this included the right to a trial by jury, a concept that was imported to the American colonies.[25]

Of relevance here, is this Court's recognition that it has only been relatively recently, that courts-martial have been authorized to try peacetime capital cases in the United States. *See, Loving, supra* at 752. Indeed, DeHart's treatise on Military Law quoted Hale's *Pleas of the Crown*, "one 'who hath a commission of martial authority doth in time of peace hang or otherwise execute any man by color of law, it is murder'" DeHart at 12. History clearly shows that prior to the ratification of the Constitution and the Bill of Rights, military courts-martial mandated "members" for both the guilt and sentencing stages, a "right" that the Framers were certainly cognizant of and which

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[23](...continued)
"express injunction of trial by jury ***in all such cases.*** R. Fairfield (ed.)," *The Federalist Papers*, at 257 (2nd ed., Doubleday Anchor, Garden City, NY, 1966).

[24]R. Rutland, *The Birth of the Bill of Rights, 1776-1791*, at 5 (Classics ed., Northeastern Univ. Press, 1983) [hereinafter, "Rutland"].

[25]Rutland notes that in 1676, the "fundamental laws" of West New Jersey required a "tryal . . . by twelve good and lawful men. . . ." and that in 1683, Pennsylvanians were tried by "a jury of twelve men." Rutland, at 18-20.

is consistent with the right to a jury trial mandated in criminal cases by Article III, § 2, cl. 3., U.S. Const.

The *Massachusetts Articles of War*, dated April 5, 1775, provided in Article 32, "No General Court Martial shall consist of a *less number than thirteen*. . . ."[26] The *American Articles of War*, dated June 30, 1775, provided in Article XXXIII, "No general court-martial shall consist of less number than thirteen. . . ." Winthrop, at 956. Repromulgated in 1776, the *American Articles of War*, in Section XIV, Art. 1, continued the not less than thirteen member requirement. Winthrop, at 967. This did not change until 1786, when the size of the "standing" Revolutionary Army had significantly decreased,[27] the *Articles of War* were now amended to read, "General courts-martial may consist of any number of commissioned officers from 5 to 13 inclusively; but they *shall not consist of less than 13, where that number can be convened without manifest injury to the service.*" Art. 1, Winthrop, at 972 [emphasis added].

When Congress enacted the *American Articles of War of 1806*, it continued in Article 64, the provision from 1786, mandating thirteen members absent a showing of "manifest injury to the service." Winthrop, at 981. Thus, it is clear that at the time of the ratification of the Constitution and the Bill of Rights, not only was the right to a jury trial secured in criminal cases, but military members subjected to trial by general courts-martial, were entitled to a thirteen member panel, absent a showing of "manifest injury to the service." Here as the Record demonstrates, the Prosecutor never made any such claim.

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[26]Reprinted in W. Winthrop, *Military Law and Precedents* (2nd ed., G.P.O. 1920; as reprinted in *The Legal Classics Library*, Gryphon Editions, Inc., 1988), at 950 [hereinafter, "Winthrop"].

[27]*See*, D. Sullivan, *Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty*, 158 Mil. L. Rev. 1, at 5, footnotes 16 and 17 (1998) [hereinafter "Sullivan, *Numbers*"].

B. The Impact of Federal Death Penalty Legislation on Petitioner's Case.

Congress in enacting 18 U.S.C. § 3593(b), has expressly provided for a twelve person jury in federal capital cases.[28] While *Amicus* does not contend that this section is directly binding on capital courts-martial, it is highly probative to a proper analysis of Petitioner's due process issue. First, Congress has expressly directed the President to "apply the principles of law . . . recognized in the trial of criminal cases in the United States district courts. . . ."[29] Equally as important is the fact that by enacting § 3593, Congress has clearly expressed its intent as to what process is due a defendant facing a federal capital sentence, *i.e.*, a twelve person jury.

Neither the *Uniform Code of Military Justice* nor the *Manual for Courts-Martial* forbids or precludes a twelve person (or more) panel in a capital case. Thus, the Congressional intent expressed in Article 36(a), U.C.M.J., to look to federal practice, cannot be ignored. But as Gray's conviction and death sentence by a six person panel shows he has, as Justice Stevens noted in his concurrence in *Loving*, "received less protection" than a civilian prosecuted for the same crimes by the United States would have received, *viz.* a twelve person jury.

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[28]This section reads in relevant part, "A jury impaneled [herein] shall consist of 12 members, unless, at any time before the conclusion of the hearing, the parties stipulate, with the approval of the court, that it shall consist of a lesser number."

[29]Article 36(a), UCMJ, 10 U.S.C. § 836(a). *Amicus* acknowledges that this provision is permissive and hence, discretionary guidance, but it is clear evidence that Congress to the extent practicable, was looking to keep the military justice system on a constitutional par with other federal criminal jurisprudence. *See, Loving, supra* at 770 for a discussion of Article 36, UCMJ, in this regard.

C. The "Settled Usage" Rule Compels a Finding that in a Peacetime Capital Court-Martial, Due Process Requires a Twelve Person Panel.[30]

At least since 1342, in Britain,[31] and then later in the American colonies, the right to a jury meant the right to a twelve person panel. Additionally, American military jurisprudence from pre-Constitutional times until relatively recently has clearly expressed a preference for panels of thirteen members. Indeed, the U.S. Attorney General in an opinion in 1819, in a capital court-martial case noted not only this preference, but the distinction for peacetime offenses.[32] History, teaches *Weiss,*

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[30]As stated in *Hurtado, supra* at 528, "a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country. . . ."

[31]*See* text accompanying footnotes 24 and 25, above.

[32]This provides in relevant part:

> This being a case, however, of life and death ... that, by the 64th article of the Rules and Articles of War, it is required that general courts-martial shall not consist of less than thirteen, where that number can be convened without manifest injury to the service. . . . It is difficult to conceive an emergency in time of peace so pressing as to disable the general officer who orders the court from convening thirteen commissioned officers on a trial of life and death, *without manifest injury to the service.* And if a smaller number act, without such manifest emergency, I repeat that they are not a lawful court, and an execution under their sentence would be murder. With all the respect, therefore, which we ought to feel for our officers, I suggest to you, sir, as a matter of legal propriety, that, *in every case of life and death at least,* the President ought to be satisfied of the manifest injury which the service would have sustained in convening a court of *thirteen,* before he gives his sanction to a sentence of death by a smaller number. 1 Op. Atty Gen. 296, 1819 U.S. AG LEXIS 21, at *6-7 (1819)

Martin v. Mott, 25 U.S. 19, at 34-35 (1827), held that the decision "as to the number (continued...)

supra at 177-78, "is a factor that must be weighed" in evaluating due process.

This Court noted in *Williams, supra,* at 103, with respect to capital cases that since "no State provides for less than 12 jurors" that fact suggested "implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty." Yet, in the thirty years since *Williams* was decided, *only* the military prosecutes capital cases with less than twelve jurors.[33] Due process comparatively and historically, if not constitutionally, requires that twelve jurors hear capital cases at least at the guilt phase. Finally, due process can never be satisfied when the *size* of a capital jury is dependant upon the caprice of the *prosecutor* seeking death.[34] Here, Petitioner was sentenced to death by six members. *Curtis* was sentenced to death by nine members,[35] a 50% larger panel, while Sergeants Kreutzer and Quintanilli "both had twelve member panels,"[36] *double* that of Petitioner herein! Such an arbitrary allotment as to life or death, respectfully should not be countenanced by this Court under any test of Due Process.

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[32](...continued)
which can be convened without manifest injury to the service," was a "matter submitted to [the] sound discretion" of the Convening Authority.

[33]Sullivan, *Numbers*, at 1.

[34]*Id.*, at 15-16.

[35]*Curtis*, 32 M.J. at 271 (Sullivan, C.J., concurring).

[36]Sullivan, *Numbers*, at 4, fn. 5. For an analysis of the *effect* the differing sizes have on capital cases, *see Id.*, at 34 *et seq.*

II. WHERE THE CONVENING AUTHORITY DETAILED FIFTEEN MEMBERS TO PETITIONER'S COURT-MARTIAL WITHOUT ANY OTHER LIMITATIONS OR RESTRICTIONS[37] AND AFTER THE INITIAL CHALLENGE PROCESS ONLY SIX MEMBERS REMAINED, IT WAS FUNDAMENTAL ERROR FOR THE MILITARY JUDGE TO HAVE DENIED PETITIONER'S MOTION TO ADD ADDITIONAL COURT MEMBERS WITHOUT SEEKING THE CONVENING AUTHORITY'S INPUT.

When Congress enacted Article 25(d)(2), U.C.M.J.,[38] it gave plenary authority and discretion to the Convening Authority to "detail" the members of a court-martial using the "best qualified" standard set out in the Article. That aspect of military law, constitutional or not, has been settled since the Court decided *Martin v. Mott, supra* in 1827. Here the Convening Authority detailed fifteen members and there is no evidence in the record that he gave any "instructions" per Rule 601(e)(1), R.C.M., regarding *prosecutorial* discretion and a twelve member panel. At issue then is what happened after challenges reduced the panel to six members and the Defense moved to delay the proceedings to allow additional members to

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[37]Rule 601(e)(1), RCM, expressly provides that the Convening Authority "may include proper instructions in the [referral] order." Thus, if the Convening Authority chose to delegate to the prosecutor the discretion as to whether or not to proceed with a panel consisting of *less than* twelve members in this case, he could have done so. He did not, and thus that authority remained with the Convening Authority. *Martin v. Mott*, 25 U.S. 19, at 34-35 (1827).

[38]10 U.S.C. § 825(d)(2), set out in fn. 14, *supra*. *Amicus* does not concede the constitutionality of that statute, but mindful of the Court's desire that *amici* not be duplicative, the NACDL concurs with Petitioner's arguments on that issue. We further agree with *amicus*, National Institute for Military Justice, who suggest that this case provides an optimal vehicle to resolve Article 25's constitutionality.

be detailed so as to have twelve members [R. 768-69][39]

Absent any "Referral" instructions from the Convening Authority (other than as capital), and absent any codal or regulatory prohibitions - a fact implicitly recognized by the military judge [R. 770] - what prevented the judge from at least seeking the Convening Authority's input? The answer lies in the record. The judge abdicated his role by ceding to the *prosecutor* the authority to decide the Defense motion, when he stated, "[I]f the government were to be of the mind that *they* wanted to have twelve members, I certainly wouldn't contest it." [R. 770; emphasis added]. Here the judge first ignored the plain statutory provisions of Article 40, U.C.M.J., 10 U.S.C. § 840, giving him the express authority to "grant a continuance to any party for such time, and as often, as may appear just." The military judge by deferring this crucial decision to the very person seeking Gray's death, totally abdicated his neutral and impartial role - a fact that denied Gray due process in the worst way. *See generally, Tumey v. Ohio,* 273 U.S. 510, at 523 (1927).[40]

It is unprecedented in criminal litigation, much less in a capital case, for the prosecutor to be given the choice of whether a capital defendant has a six person or a twelve person panel to decide his fate. This Court has long recognized that:

> [I]mportant constitutional guarantees come into play once the citizen - whether soldier or civilian - is charged with a capital crime . . . . The most

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[39]*See* Winthrop at 79-80, regarding "Supernumerary Members," *i.e.*, alternate members. While he notes that the practice was no longer used at the time of his treatise, such a practice here would have avoided this issue.

[40]*Compare, United States v. Ramos,* 42 M.J. 392 (1995), and cases cited therein on judicial impartiality.

> significant of these is the right to a trial by jury, one of the most important safeguards against tyranny which our law has designed. *Lee v. Madigan,* 358 U.S. 228, at 234 (1959).

Furthermore, albeit in another context, the Court has observed that one of the fundamental purposes of a jury trial (or court-martial panel) was to provide a safeguard against an "overzealous prosecutor." *Duncan v. Louisiana,* 391 U.S. 145, at 156 (1968). Regardless of this Court's disposition of the other issues herein, *amicus* urges this Court to resolve this issue - it is constitutionally impermissible under Fifth Amendment due process principles and Eighth Amendment concepts of arbitrariness. *Furman v. Georgia, supra.* The process here of allowing the prosecutor[41] by mere objection to simply block the accused's efforts to have the Convening Authority, the person legally charged with "detailing" court members, appoint twelve members *in a capital case*, not only reflects an abdication of judicial responsibility, but is an arbitrary perversion of our Constitutional system. It cannot stand in a civilized society - civilian or military - as the key to life or death for Ronald Gray.

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[41]This is not an issue of traditional prosecutorial discretion. *Compare, Oyler v. Boles,* 368 U.S. 448 (1962).

CONCLUSIONS

Justice Harlan once observed:

> So far as capital cases are concerned, I think they stand on quite a different footing than other offenses. In such cases the law is especially sensitive to demands for . . . procedural fairness which inheres in a civilian trial . . . . I do not concede that whatever process is "due" an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case. The distinction is by no means novel . . . nor is it negligible, being literally that between life and death. *Reid v. Covert,* 354 U.S. 1, at 77 (1957) [Harlan, J., concurring].

This case is about fundamental fairness to a citizen-soldier who faces death, not from combat, but from a courtroom. *Amicus Curiae* respectfully urges this Court to grant *certiorari* to consider the fundamental due process issues involved with the size of Petitioner's jury - half that of civilian defendants similarly situated, and half that of two other *military* capital defendants.[42] The issue is preserved, systemic and unlikely to percolate in any other Court of Appeals.

Even more compelling and in need of guidance from this Court are the Eighth Amendment, arbitrariness issues created by a judge who breached his judicial role and allowed the *prosecutor* to interfere with Petitioner's *statutory* right to have the Convening Authority select the size of his court-martial panel. In an adversarial criminal justice system, which our

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[42]Due process also encompasses "equal protection" concepts, *Bolling v. Sharpe,* 347 U.S. 497 (1954), an issue specifically raised by Gray at trial [R. 768].

courts-martial practice surely is, to allow one of the litigants the arbitrary power to control the size of the forum adjudicating Petitioner's life or death, is a miscarriage of justice of Constitutional dimensions.

Justice Black observed some years ago that:

> Perhaps no group in the Nation has remained truer [to the Constitution] than military men themselves. Unlike the soldiers of many other nations, they have been content to perform their military duties in defense of the Nation in every period of need and to perform those duties well without attempting to usurp power which is not theirs under our system of constitutional government. *Reid v. Covert, supra* at 40.

NACDL as *amicus curiae* respectfully urges this Court to grant *certiorari* on Petitioner's issues to insure that all citizens - civilians, Soldiers, Sailors, Airmen and Marines, do not suffer death from the Government in disparate fashions.

Respectfully submitted,

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